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No. _____

Supreme Court, U.S.
FILED

APR 27 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOHN R. STRELKOFF,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Writ of Certiorari to the
Supreme Court of the Commonwealth of Pennsylvania

**PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

Of Counsel:

BASKIN FLAHERTY ELLIOTT
& MANNINO, P.C.

JOHN M. ELLIOTT

JAMES J. ROHN

1800 Three Mellon Bank
Center

Philadelphia, PA 19102
(215) 977-7400

*Attorneys for Petitioner
John R. Strelkoff*



QUESTION PRESENTED FOR REVIEW

This matter arises from a criminal prosecution by the Snyder County District Attorney in the Commonwealth of Pennsylvania. On July 27, 1984, Petitioner was arrested and charged with burglary, theft, receiving stolen property, criminal conspiracy and the unauthorized use of a motor vehicle. Petitioner, thereafter, entered a plea of nolo contendere pursuant to a negotiated plea agreement in which the prosecutor agreed, *inter alia*, to make no recommendations at Petitioner's sentencing hearing.

On August 15, 1985, a sentencing hearing was held for Petitioner at which time Petitioner presented witnesses who testified concerning his good character and certain psychological problems affecting him. Upon completion of the direct and cross examination of Petitioner's witnesses, Petitioner's counsel argued for probation, stressing Petitioner's age, family background, first-offender status and the fact that he was clearly making great strides in improving himself. Following Petitioner's presentation, the prosecutor, sensing that Petitioner's witnesses provided credible testimony that Petitioner and society would best be served by a term of probation, made the following unwarranted statements:

MS. REED [Prosecutor]: Yes, your Honor. I'd like to make a statement commenting on this sentencing to this effect.

MR. MUOLO [Defense Counsel]: Your Honor, I believe in the plea agreement the Commonwealth had agreed that it would remain mute at the time of sentencing with regard to any recommendations, either pro-probation, pro-incarceration or otherwise.

MS. REED [Prosecutor]: I'm not planning to recommend anything specific.

THE COURT: I do have in front of me the face sheet of the guilty plea form, and it indicates the plea agreement was a reduction of charges to the lowest misdemeanor and no recommendation on sentence from the District Attorney. Now, with that in mind do your statements fall into that category?

MS. REED [Prosecutor]: No, they don't, your Honor. I feel compelled, though, to comment, because what we have here is not just a flash in the pan type crime, but a series of crimes committed over a period of several weeks involving several incidents, numerous victims. We also have a situation where we have several planned incidents where—

MR. MUOLO [Defense Counsel]: Your Honor, at this point, although this may not be a recommendation for the amount of sentence, I believe there is at least an inference—

THE COURT: I don't think she is violating the agreement when she reminds me of the factors to take into consideration of sentence. She's not making any recommendation as to what it might be. These are factors I'm aware of, of course, but Mrs. Reed, you may continue.

MS. REED [Prosecutor]: Thank you, your Honor. I wanted to just bring out again the planned nature of a couple of these instances. For example, the unlocking of the doors in one establishment earlier in the day so that the persons, Petitioner and the codefendant, could come back later that night and perform their criminal act. . . .

The planned nature where one would keep the bartender, for instance, busy while the other would be taking money out of the back. Now, we would submit that it was not drink and some kind of an unconscious force pulling Petitioner motivated by a desire to get his folks together, but rather a planned, thought out decision on his part to engage in this criminal activity. . . .

And as pointed out in testimony earlier in this case, a large number of criminal defendants and — have had an unhappy home life. But the Commonwealth would submit there's also a large number who have had unhappy childhoods based upon their parents' problems who didn't turn to criminal conduct, and that the choice was in fact Petitioner's alone.

Following the prosecutor's statements, the court sentenced Petitioner to concurrent sentences of imprisonment on each bill

for a cumulative period of incarceration of not less than six (6) months and not more than twenty-three (23) months. The Court also assessed a fine, costs and restitution against Petitioner. Petitioner timely filed a Motion To Modify Sentence which was denied by the sentencing court.

Petitioner's subsequent attempts to modify his sentence have, to date, been unsuccessful. Petitioner herein seeks relief for the deprivation of his constitutional rights by the overzealous Snyder County prosecutor and requests that this Court address the following important question:

Does a prosecutor violate an individual's 5th Amendment, 6th Amendment and 14th Amendment rights by making statements at a sentencing hearing which are calculated solely to lead to the imposition of a harsher sentence after the prosecutor induced the individual to enter into a negotiated plea agreement which provided, *inter alia*, that the prosecutor would make no sentencing recommendation?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW.....	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS.....	2
STATEMENT OF THE CASE	3
A. PROCEDURAL HISTORY	3
B. CHRONOLOGY OF EVENTS	4
REASONS FOR GRANTING THE WRIT	8
A. INTRODUCTION.....	8
B. THE PROSECUTOR'S FAILURE TO STRICTLY HONOR THE TERMS OF PETITIONER'S PLEA AGREEMENT VIOLATED THE UNITED STATES SUPREME COURT'S HOLD- ING IN <i>SANTOBELLO V. NEW YORK</i>	9
C. BY BREACHING HER PROMISE TO MAKE NO RECOMMENDATION, THE PROSECUTOR VIOLATED THE LAW OF PENNSYLVANIA AND PETITIONER'S CONSTITUTIONAL RIGHTS	10
CONCLUSION	14
APPENDIX:	
LETTER CONFIRMING ORDER OF THE SU- PREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA DENYING PETITION FOR AL- LOWANCE OF APPEAL DATED FEBRUARY 24, 1987	A-1

TABLE OF CONTENTS—(*Continued*)

	Page
ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA AF- FIRMING JUDGEMENT OF SENTENCE DATED AUGUST 13, 1986.....	A-2
OPINION OF THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA DATED AUGUST 13, 1986.....	A-3
ORDER OF THE COURT OF COMMON PLEAS OF THE COMMONWEALTH OF PENNSYLVANIA 17TH JUDICIAL DISTRICT, SNYDER COUNTY BRANCH DENYING MOTION TO MOD- IFY SENTENCE DATED SEPTEMBER 11, 1985..	A-4
OPINION OF THE COURT OF COMMON PLEAS OF THE COMMONWEALTH OF PENNSYLVANIA 17TH JUDICIAL DISTRICT, SNYDER COUNTY BRANCH DATED OCTOBER 11, 1985..	A-5

TABLE OF AUTHORITIES

Cases:	Page
<i>Commonwealth v. Alvarado</i> , 442 Pa. 516, 276 A.2d 526 (1971).....	8,11,12
<i>Commonwealth v. Landi</i> , 280 Pa.Super. 134, 421 A.2d 442 (1980).....	8
<i>Commonwealth v. Williams</i> , 333 Pa.Super. 77, 481 A.2d 1230 (1984)	8
<i>Commonwealth v. Zuber</i> , 446 Pa. 453, 353 A2d. 441 (1976).....	8
<i>Santobello v. New York</i> , 404 U.S. 257 (1971).....	8,9,14
<i>United States v. Corsentino</i> , 685 F.2d 48 (2d Cir. 1982). .	8,13
<i>United States v. Crusco</i> , 536 F.2d 21 (3d Cir. 1976)	8,10,12,13,14
<i>United States v. Valenciano</i> , 495 F.2d 585 (3d Cir. 1974). .	10
<i>United States Constitution:</i>	
Fifth Amendment	2
Sixth Amendment	2
Fourteenth Amendment	3

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOHN R. STRELKOFF,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Writ of Certiorari to the
Supreme Court of the Commonwealth of Pennsylvania

**PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

OPINIONS BELOW

The Order entered without opinion by the Supreme Court of Pennsylvania denying Petitioner's Petition for Allowance of Appeal was not officially reported, and an official communication of its effect is printed in the Appendix at pg. A-1.

The Order and opinion by the Superior Court of Pennsylvania affirming an Order entered by the Snyder County Court of Common Pleas denying Petitioner's Motion to Modify Sentence was not officially reported, and is printed in the Appendix at pp. A-2—A-3.

The Order and opinion by the Snyder County Court of Common Pleas for the Commonwealth of Pennsylvania denying

Petitioner's Motion to Modify Sentence was not officially reported, and is printed in the Appendix at pp. A-4—A-6.

JURISDICTION

The Order by the Supreme Court of the Commonwealth of Pennsylvania dated February 24, 1987 was entered on February 24, 1987. Petitioner invokes the jurisdiction of this Court under and pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

1. The Fifth Amendment to the Constitution of the United States of America, U.S. CONST. amend. V provides:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Sixth Amendment to the Constitution of the United States of America, U.S. CONST. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy a right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. The Fourteenth Amendment to the Constitution of the United States of America, U.S. CONST. amend. XIV, section 1 provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

As previously stated, Petitioner was arrested on July 27, 1984, and charged with burglary, theft, receiving stolen property, criminal conspiracy and the unauthorized use of a motor vehicle. On January 28, 1985, he appeared in the Snyder County Court of Common Pleas and entered a plea of nolo contendere pursuant to a negotiated plea agreement whereby the prosecutor agreed, *inter alia*, to make no recommendation as to Petitioner's sentencing.

Petitioner's sentencing hearing was held on August 15, 1985, at which time the Honorable James F. McClure, Jr., P.J. imposed a sentence of not less than 6 months nor more than 23 months imprisonment, in addition to costs, fine and restitution. During the sentencing hearing, however, the prosecutor breached the terms of the plea agreement to make no recommendation as to Petitioner's sentencing.

Petitioner timely filed a Motion to Modify Sentence with the sentencing court on August 23, 1985, based upon the prosecutor's deliberate breach of the negotiated plea agreement. (R.

5a).¹ Petitioner's motion was opposed by the Commonwealth. On September 11, 1985, the sentencing court denied Petitioner's Motion To Modify Sentence. On September 12, 1985, Petitioner appealed the denial of his motion to the Superior Court of Pennsylvania in Harrisburg. Thereafter, on August 13, 1986, the superior court affirmed the Order of the sentencing court. On September 12, 1986, Petitioner timely filed a Petition For Allowance Of Appeal with the Pennsylvania Supreme Court in Harrisburg. The Petition For Allowance Of Appeal was denied on February 24, 1987.

B. CHRONOLOGY OF EVENTS

On January 28, 1985, Petitioner appeared and entered a plea of nolo contendere pursuant to a negotiated plea agreement with the Commonwealth whereby Petitioner agreed to accept sentencing for the following misdemeanors: (a) receiving stolen property; (b) unauthorized use of a motor vehicle; (c) criminal mischief; and (d) theft by deception. Petitioner also agreed to make restitution for the alleged crimes. In exchange for his plea, restitution, and the waiver of Petitioner's constitutional rights, the prosecutor promised not to make any recommendation at Petitioner's sentencing hearing. (R. 102a).

On August 15, 1985, the sentencing hearing was held before the Honorable James J. McClure, Jr., P.J.. At Petitioner's hearing, evidence was offered from several sources including the pre-sentence investigation report conducted by the Snyder County Probation Office. The report revealed that Petitioner was a twenty-year old freshman student at Susquehanna University with no prior juvenile or adult arrest record. (R. 78a). During his enrollment at Susquehanna, Petitioner worked for McDonalds in Shamokin Dam, Pennsylvania. (R. 85a). Just prior to his matriculation at Susquehanna, Petitioner's parents underwent a

1. Contemporaneously with the filing of this Petition for Writ of Certiorari, Petitioner has requested the Clerk of the Snyder County Court of Common Pleas to certify and provide for the transmission of the entire record in this proceeding to the Clerk of the United States Supreme Court as permitted pursuant to Rule 19.1 of the Supreme Court Rules.

separation due to an alcohol problem. (R. 82a). Following that separation, Petitioner remained at home with his mother, two sisters and two brothers until he left for college. (R. 82a-83a). The Chief of Police of Petitioner's hometown, in a letter to the Snyder County Probation Office, stated that Petitioner and his family enjoyed an excellent reputation in the community, that he had no criminal history, presented no problem in the community and was active in high school sports. (R. 87a).

The evidence also showed that, following his arrest until sometime prior to sentencing, Petitioner was employed full-time by Dunn & Bradstreet as a mail clerk. Petitioner's supervisor described him as a reliable worker with a good work attitude. Because of those work habits, Petitioner was awarded two successive salary increases in January and March 1985, together with an upgraded job classification. (R. 85a). At the time of sentencing, Petitioner was employed by Prudential Insurance Company as a Pension Technician. (R. 36a). The pre-sentence investigation report concluded that Petitioner was very cooperative throughout the investigation.

Testimony was offered on Petitioner's behalf by Monsignor Vincent Puma, a therapist who was providing counseling to him. Monsignor Puma testified that Petitioner was the victim of a disfunctioning set of parents who were unable to provide a caring home-life. (R. 12a). As a result, Petitioner malfunctioned scholastically and was socially withdrawn, possessing passive-aggressive tendencies. (R. 14a-15a). Monsignor Puma testified that the separation of petitioner's parents traumatically affected him. (R. 15a-18a). The Monsignor characterized Petitioner's criminal behavior as totally out of character and a cry for help for himself and his family. (R. 15a-16a). Monsignor Puma also testified that since his arrest, Petitioner had made great strides in personal improvement. (R. 16a). The Monsignor also stated that incarcerating Petitioner would be very detrimental to Petitioner and likely lead to depression and possible suicide. (R. 20a-21a). Overall, Monsignor Puma's testimony established that Petitioner was moving in a positive direction and becoming a productive member of society.

Upon completion of the direct and cross examination of Monsignor Puma, Petitioner's counsel argued for probation, stressing Petitioner's age, family background, first-offender status and the fact that he was clearly making great strides in improving himself. Following Petitioner's presentation, the prosecutor, sensing that Petitioner's witnesses provided credible testimony that Petitioner and society would best be served by a term of probation, made the following unwarranted statements:

MS. REED [Prosecutor]: Yes, your Honor. I'd like to make a statement commenting on this sentencing to this effect.

MR. MUOLO [Defense Counsel]: Your Honor, I believe in the plea agreement the Commonwealth had agreed that it would remain mute at the time of sentencing with regard to any recommendations, either pro-probation, pro-incarceration or otherwise.

MS. REED [Prosecutor]: I'm not planning to recommend anything specific—

THE COURT: I do have in front of me the face sheet of the guilty plea form, and it indicates the plea agreement was a reduction of charges to the lowest misdemeanor and no recommendation on sentence from the District Attorney. Now, with that in mind do your statements fall into that category?

MS. REED [Prosecutor]: No, they don't, your Honor. I feel compelled, though, to comment, because what we have here is not just a flash in the pan type crime, but a series of crimes committed over a period of several weeks involving several incidents, numerous victims. We also have a situation where we have several planned incidents where—

MR. MUOLO [Defense Counsel]: Your Honor, at this point, although this may not be a recommendation for the amount of sentence, I believe there is at least an inference—

THE COURT: I don't think she is violating the agreement when she reminds me of the factors to take into consideration of sentence. She's not making any recommendation as

to what it might be. These are factors I'm aware of, of course, but Mrs. Reed, you may continue.

MS. REED [Prosecutor]: Thank you, your Honor. I wanted to just bring out again the planned nature of a couple of these instances. For example, the unlocking of the doors in one establishment earlier in the day so that the persons, Petitioner and the codefendant, could come back later that night and perform their criminal act. . . .

The planned nature where one would keep the bartender, for instance, busy while the other would be taking money out of the back. Now, we would submit that it was not drink and some kind of an unconscious force pulling Petitioner motivated by a desire to get his folks together, but rather a planned, thought out decision on his part to engage in this criminal activity. . . .

And as pointed out in testimony earlier in this case, a large number of criminal defendants and — have had an unhappy home life. But the Commonwealth would submit there's also a large number who have had unhappy childhoods based upon their parents' problems who didn't turn to criminal conduct, and that the choice was in fact Petitioner's alone.

(R. 45a-47a).

Following the prosecutor's statements, the court sentenced Petitioner to concurrent sentences of imprisonment on each bill for a cumulative period of incarceration of not less than six (6) months and not more than twenty-three (23) months. (R. 52a-54a; 61a-65a). The Court also assessed a fine, costs and restitution against Petitioner. (R. 52a-54a; 61a-65a). Petitioner timely filed a Motion To Modify Sentence which was denied by the sentencing court.

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION.

This case presents the fundamental constitutional question of whether a prosecutor who induces a defendant to enter into a negotiated plea agreement by promising, *inter alia*, not to make any sentencing recommendations violates an individual's constitutional rights by breaching the agreement and making statements designed to encourage the sentencing court to impose a harsher sentence. That question has been affirmatively answered by numerous courts, both state and federal, which have consistently held that once an individual enters a plea pursuant to a negotiated plea agreement, the individual has a constitutional right to the benefit of the plea agreement and the prosecutor is obligated to strictly comply with its terms. *Santobello v. New York*, 404 U.S. 257 (1971); *United States v. Crusco*, 536 F.2d 21 (3d Cir. 1976); *United States v. Corsentino*, 685 F.2d 48 (2d Cir. 1982); *Commonwealth v. Zuber*, 446 Pa. 453, 353 A.2d 441 (1976); *Commonwealth v. Alvarado*, 442 Pa. 516, 276 A.2d 526 (1971); *Commonwealth v. Williams*, 333 Pa. Super. 77, 481 A.2d 1230 (1984); *Commonwealth v. Landi*, 280 Pa. Super. 134, 421 A.2d 442 (1980). In the instant case, the prosecution clearly deprived Petitioner of the benefit of his plea agreement by blatantly breaching its terms. After the prosecutor's wrongful conduct, the sentencing court imposed a prison sentence upon Petitioner which was affirmed upon appeal. *Commonwealth v. Strelkoff*, No. 640 (August 13, 1986). In affirming the sentence, the superior court decided a fundamental issue of criminal law in a way that: (1) is inconsistent with a decision of the Supreme Court of the United States, *Santobello v. New York*, *supra*; (2) is inconsistent with a decision of the Pennsylvania Supreme Court, *Commonwealth v. Alvarado*, *supra*; and (3) is violative of Petitioner's 5th Amendment, 6th Amendment and 14th Amendment rights guaranteed by the United States Constitution. For these reasons, the Court should grant the petition for Writ of Certiorari.

B. THE PROSECUTOR'S FAILURE TO STRICTLY HONOR THE TERMS OF PETITIONER'S PLEA AGREEMENT VIOLATED THE UNITED STATES SUPREME COURT'S HOLDING IN *SANTOBELLO V. NEW YORK*.

Negotiated plea agreements are an integral and vital part of today's criminal justice system and lead to prompt and final dispositions of most criminal cases. *Santobello v. New York, supra*, 404 U.S. at 261 (1971). Although plea agreements are often referred to as "bargains", the expense to the defendant is great, for the entry of a guilty plea necessitates the waiver by an individual of many fundamental constitutional rights including the right to a jury trial; the right to confront one's accusers; the right to present witnesses in one's defense, the right to remain silent; and the right to be convicted only when a jury is convinced of one's guilt beyond all reasonable doubt. *Santobello v. New York, supra*, 404 U.S. at 264 (Douglas J. concurring). Accordingly, the entry of a guilty plea is a serious and sobering occasion which must be attended by safeguards to insure that the defendant is provided with what is reasonably due under the circumstances. *Santobello v. New York, supra*, 404 U.S. at 262. One such safeguard is strict fulfillment of the promises which induced the plea. *Id.*

In the instant case, Petitioner negotiated with the prosecutor that in return for a nolo contendere plea to certain specified charges, the prosecutor would dismiss other charges and would further agree not to make any recommendation at Petitioner's sentencing hearing. Petitioner dutifully fulfilled his part of the plea agreement. He did not, however, obtain the benefit of his bargain with the prosecutor. Instead, at the close of the sentencing hearing, the prosecutor made unwarranted and prejudicial statements to induce the imposition of a harsher sentence. Clearly the prosecutor's conduct violated the *Santobello* doctrine.

This is not a case where the Petitioner seeks to withdraw his plea because he expected to receive a less severe sentence. Petitioner acknowledges that the sentencing court had no constraints placed upon it in imposing a sentence upon him. Petitioner merely wants the benefit of his bargain with the prosecutor that originally induced him to waive his constitutional protections. In cases such as Petitioner's, federal courts have granted relief from the actions of overzealous prosecutors who violate the terms of plea agreements. *United States v. Crusco*, 536 F.2d (3d Cir. 1976); *United States v. Valenciano*, 495 F.2d 585 (3d Cir. 1974).

C. BY BREACHING HER PROMISE TO MAKE NO RECOMMENDATION, THE PROSECUTOR VIOLATED THE LAW OF PENNSYLVANIA AND PETITIONER'S CONSTITUTIONAL RIGHTS.

The negotiated plea agreement between Petitioner and the prosecutor was based in large part on the Commonwealth's promise that it would make no sentencing recommendation. However, the prosecutor directly breached the plea agreement by vigorously countering Monsignor Puma's and defendant's counsel's pleas for leniency by graphically highlighting the very factors likely lead to a harsher sentence:

I'd like to make a statement commenting on this sentencing to this effect.

I feel compelled . . . to comment because what we have here is not just a flash in the pan type crime, but a series of crimes committed over a period of several weeks involving incidents, numerous victims. We also have a situation where we have several planned incidents where —

I wanted to just bring out again the planned nature of a couple of these instances. For example, the unlocking of the doors in one establishment earlier in the day so that the

persons, Petitioner and the codefendant could come back later that night and perform their criminal act.

The planned nature where one would keep the bartender, for instance, busy while the other would be taking money out of the back. Now we would submit that it was not drink and some kind of an unconscious force pulling Petitioner motivated by a desire to get his folks together, but rather a planned, thought out decision on his part to engage in this criminal activity.

(R. 45a-47a). Clearly, the only possible explanation for the prosecutor's statements was her desire to have a harsher sentence imposed upon Petitioner. Such conduct has been specifically prohibited in *Commonwealth v. Alvarado, supra* where the Pennsylvania Supreme Court addressed a virtually identical issue.

In *Alvarado*, the defendant pleaded guilty to an indictment charging him with rape and murder. His plea was made in exchange for the Commonwealth's promise not to recommend the death penalty. Following a degree of guilt hearing, a three judge panel sentenced *Alvarado* to death, rather than to life imprisonment. *Alvarado* appealed the death sentence arguing that the prosecutor broke his promise not to recommend the death penalty by enumerating, at the degree of guilt hearing, a long list of sentencing factors, the unmistakable purpose of which was to persuade the panel that the defendant deserved to die. *Commonwealth v. Alvarado, supra* at 520-21, 276 A.2d at 528. Although "the record [disclosed] that the prosecutor never specifically urged or expressly recommended the death penalty," *id.*, the Court agreed that the prosecutor had, by describing the defendant's crimes in detail, broken his promise not to recommend the death sentence. The Commonwealth argued that the prosecutor's remarks in *Alvarado* did not constitute a recommendation as to sentencing. That argument was rejected:

The Commonwealth would dismiss the above references as a mere vigorous "review of the evidence." That may be so — *but a review for what purpose?* These statements were

made after Alvarado had already been found guilty of first degree murder and *there remained to be decided only whether his punishment should be life imprisonment or death . . . Consequently, the only conceivable purpose of the references to the brutal nature of the crime and to Alvarado's apparent remorselessness was to persuade the court to assign the harsher of the two possible penalties.*

Id. at 521-22, 276 A.2d at 528.

The prosecutor's remarks at the sentencing hearing in the present case are virtually identical to those made by the prosecutor in *Alvarado* except *Alvarado* dealt with a sentencing choice between death and life imprisonment whereas Petitioner's sentencing choice was between incarceration and probation. As in *Alvarado*, the only conceivable purpose of the overzealous prosecutor's statements concerning the premeditated and deliberate nature of Petitioner's crimes and the irrelevance of his psychological history was to persuade the sentencing court "to assign the harsher of the two possible penalties." As such, the prosecutor's statements violated the mandate of *Alvarado* and denied Petitioner due process and other constitutional rights.

Although the Commonwealth may argue that the prosecutor was obligated to refrain only from recommending a *specific* sentence, this argument, too, must fail, having been considered and rejected by the Third Circuit in *United States v. Crusco*, 536 F.2d 21 (3d Cir. 1976). In *Crusco*, the defendant was charged with one count of conspiracy and possession with intent to distribute controlled substances and a second count of possession with intent to distribute and distribution of heroin substances. Pursuant to a negotiated plea agreement, the defendant pleaded guilty to the second count in exchange for the prosecutor's promise to take no position on sentencing. At the sentencing hearing, the defendant's attorney argued for leniency. The prosecutor, after stating that he was leaving the sentencing decision to the judge, countered with arguments that the defendant had strong

ties to organized crime and that he was a danger to the community. The Third Circuit Court of Appeals held that the prosecutor's conduct violated the plea agreement:

We see the Government's characterization as a transparent effort to influence the severity of Cimmino's sentence. *Only a stubbornly literal mind would refuse to regard the Government's commentary as communicating a position on sentencing.*

United States v. Crusco, 536 F.2d at 26 (emphasis added). See also *United States v. Corsentino*, 685 F.2d 48 (2d Cir. 1982) (unmistakable import of attorney's comments violates plea agreement).

Here, as in *Crusco*, the prosecutor's remarks were designed solely to elicit a harsher sentence from the sentencing judge. Such statements, unrelated as they were to Petitioner's presentation at the sentencing hearing, and plainly not designed to correct any factual errors made by defense counsel in his presentation, represented, even more clearly than the government's remarks in *Crusco*, "a transparent attempt to influence the severity of" the Petitioner's sentence. *United States v. Crusco*, *Id.* at 26. They did not nor could they have served any other purpose.

CONCLUSION

As the United States Supreme Court held in *Santobello v. New York, supra*, the terms of a negotiated plea agreement must be strictly enforced. Accordingly, once a plea agreement in which a prosecutor agrees to make no recommendation on sentencing is made, the *Santobello* doctrine requires strict adherence. *United States v. Crusco*, 536 F.2d at 26. The *Santobello* and *Crusco* decisions mandate that a prosecutor's bargained-for promise not to recommend a sentence must be interpreted to require the prosecutor to refrain from making any remarks regarding sentencing. By allowing comments such as those made by the prosecutor herein, and thereafter, refusing to modify Petitioner's sentence, the sentencing court violated Petitioner's due process rights. This violation has not been corrected despite timely appeals to the highest court in the State of Pennsylvania. For the foregoing reasons, Petitioner requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

OF COUNSEL:

BASKIN FLAHERTY ELLIOTT
& MANNINO, P.C.

JOHN M. ELLIOTT
JAMES J. ROHN
1800 Three Mellon Bank Center
Philadelphia, PA 19102
(215) 977-7400

- Attorneys for Petitioner
John R. Strelkoff

APPENDIX



Supreme Court of Pennsylvania

Middle District

Mildred E. Williamson
Deputy Prothonotary

434 Main Capitol Building
P.O. Box 624
Harrisburg, Pennsylvania 17108
(717) 787-6181

March 5, 1987

John M. Elliott, Esquire
James L. Rohn, Esquire
Suite 1001
Ten Penn Center
1801 Market Street
Philadelphia, Pa. 19103

Re: Commonwealth v. John R. Strelkoff, Petitioner
No. 237 M. D. Allocatur Docket 1986

Gentlemen:

This is to advise that on February 24, 1987 the Supreme Court entered its Order DENYING the Petition for Allowance of Appeal filed in the above-captioned matter.

Very truly yours,

/s/ Mildred E. Williamson

Mildred E. Williamson,
Deputy Prothonotary

MEW/spb

cc: John T. Robinson, Esquire
President Judge — Snyder County
(No. 116/117 of 1984)

ORDER OF SUPERIOR COURT

COMMONWEALTH OF : IN THE SUPERIOR COURT
PENNSYLVANIA : OF PENNSYLVANIA
:
US. :
:
JOHN R. STRELKOFF, : No. 00640 HARRISBURG 1985
Appellant :

**APPEAL FROM THE JUDGMENT OF SENTENCE OF
AUGUST 19, 1985, IN THE COURT OF COMMON
PLEAS OF SNYDER COUNTY, CRIMINAL DIVISION,
AT NO. 116-1984, 117-1984**

BEFORE: WIEAND, BECK and WATKINS, JJ.

PER CURIAM: FILED: AUGUST 13, 1986

Judgment of sentence affirmed.

DATED: AUGUST 13, 1986 JUDGMENT ENTERED

DEPUTY PROTHONOTARY

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
US.	:	
	:	
JOHN R. STRELKOFF, <i>Appellant</i>	:	No. 00640 HARRISBURG 1985

**APPEAL FROM THE JUDGMENT OF SENTENCE OF
AUGUST 19, 1985, IN THE COURT OF COMMON
PLEAS OF SNYDER COUNTY, CRIMINAL DIVISION,
AT NO. 116-1984, 117-1984**

BEFORE: WIEAND, BECK and WATKINS, JJ.

MEMORANDUM: FILED: August 13, 1986

In accordance with a plea agreement the appellant entered, and the court accepted, pleas of nolo contendere to theft by deception, theft by unlawful taking and unauthorized use of a motor vehicle.

On appeal appellant asserts that the Commonwealth violated its agreement to make no recommendation as to appellant's sentence by making statements regarding sentencing. As a consequence, appellant asserts he is entitled to be resentenced in accordance with the terms of the plea agreement.

Appellant admits that the district attorney made no direct recommendation as to sentencing. However, appellant asserts that the district attorney in his comments at the sentencing hearings attempted to do indirectly what the district attorney was prohibited from doing directly.

We have considered the record, the briefs, the trial court opinion and the persuasive arguments at oral argument. We find that the trial court's opinion correctly addresses appellant's challenge and we adopt the trial court's opinion.

Judgment of sentence affirmed.

IN THE COURT OF COMMON PLEAS OF
THE 17TH JUDICIAL DISTRICT
SNYDER COUNTY BRANCH — CRIMINAL
NOS. 116 & 117, 1984

COMMONWEALTH OF PENNSYLVANIA *

US. *
JOHN R. STRELKOFF, *
Defendant *

ORDER

AND NOW, this 11th day of September, 1985, it is ORDERED that the defendant's Motion to Modify Sentence is denied.

BY THE COURT:

/s/ James F. McClure, Jr., P.J.
James F. McClure, Jr., P. J.

cc: John T. Robinson, Esq., District Attorney
Robert J. Muolo, Esq.
Defendant

IN THE COURT OF COMMON PLEAS OF
THE 17TH JUDICIAL DISTRICT
SNYDER COUNTY BRANCH — CRIMINAL
NOS. 116 & 117, 1984

COMMONWEALTH OF PENNSYLVANIA *

vs.

*

JOHN R. STRELKOFF,

*

Defendant *

OPINION UNDER Pa.R.A.P. 1925(a)

McClure, P.J. — October 11, 1985

On January 28, 1985, in accordance with a plea agreement, the defendant entered pleas of nolle contendere, accepted by the Court, to theft by deception (Count II — misdemeanor of the third degree), theft by unlawful taking (Count IV — misdemeanor of the third degree), and unauthorized use of a vehicle (Count VI — reduced by agreement to a misdemeanor of the second degree).

On August 15, 1985, after completion of a presentence investigation, the defendant was sentenced on all counts *inter alia* to the county jail for six (6) to twelve (12) months to run concurrently with the sentence imposed to No. 116, 1984.

The transcript of the sentencing proceeding encompasses both Nos. 116 and 117, 1984.

Defendant timely filed a Motion for Modification of Sentence, which was denied without hearing on September 11, 1984.

All of the reasons for the sentence and, therefore, the reasons for the denial of the Motion to Modify Sentence were set forth at length at the sentencing hearing. The Court is referred

in particular to pages 43 through 47 of the transcript of the sentencing proceeding. The attention of the Court is also drawn to the fact that the transcript of the sentencing proceeding is 53 pages in length, to illustrate the care given to this particular sentencing.

The controlling sentence of six (6) to twenty-three (23) months given under Count VIII of No. 116, 1984 was well within the normal minimum range of the sentencing guidelines of zero (0) to twelve (12) months.

The Court at the time of sentencing gave full consideration to all of the factors set forth in defendant's Motion to Modify Sentence and there should be no need to repeat them at this time. In paragraph 16 of the Motion to Modify Sentence, the defendant suggests that the district attorney violated the plea agreement by commenting on the sentencing in such a fashion as to suggest to the Court that a term of imprisonment should be imposed. The plea agreement specifically included, aside from the various nol prossing of other charges that there be "no recommendation on sentence from D.A." The Court is directed again to the transcript at pages 41 to 43, at which point the Assistant District Attorney, Mrs. Reed, did comment on the situation but made no recommendation and, therefore, in the opinion of this Court did not violate the plea agreement. The terms of the plea agreement are set forth on the face sheet of a written plea colloquy form that was duly filed January 28, 1985 and is part of the record.

BY THE COURT:

/s/ James F. McClure, Jr., P.J.

James F. McClure, Jr., P. J.

cc: John T. Robinson, Esq., District Attorney
Robert J. Muolo, Esq.
Defendant

